

FUSING CONSTRUCTION SDN. BHD.

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v.

SIA KIE SUNG & ORS.

COURT OF APPEAL, KUALA LUMPUR

MAHADEV SHANKAR JCA

b

ABU MANSOR ALI JCA

ABDUL MALEK AHMAD JCA

[CIVIL APPEAL NO: S-02-227-1995]

19 AUGUST 1996

LAW OF TRUST: *Suits against resulting trustee - Sabah Limitation Ordinance s. 9 - Suits commenced after lapse of six-year period provided by Art. 97 of Schedule thereto - Whether time barred - Resulting trust - Whether out of purview of s. 9.*

c

LAW OF TRUST: *Express trust - Formation - Whether could exist in absence of a declaration of trust - Whether a matter of inference.*

d

In 1984, the appellant ('Fusing') became the registered transferee and legal owner of a shophouse in Tawau, Sabah ('the premises'). Subsequently, the premises was leased to EON Finance Bhd. ('EON Finance'). EON Finance later alleged that the beneficial owner of the shophouse was not Fusing but EON Bank Bhd. ('EON Bank'), and so refused to pay the rental or vacate the premises. In the ensuing action (*inter alia* for vacant possession) filed by Fusing against EON Finance, after the pleadings were closed, EON Bank and one Sia Kie Sung ('Sia'), each claiming to have provided the entire purchase money for the premises, applied and were allowed to intervene in the action. This application was made in February 1995.

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Fusing was dissatisfied with the order and has since appealed. Before the learned appeal Judges, Fusing argued that both EON Bank and Sia ought not to have been allowed to intervene as their claim was barred by s. 9 of the Sabah Limitation Ordinance. Sia and EON Bank claimed that because they had provided the moneys, there was a resulting trust in their favour, with the result that their claim could not be barred by the lapse of any length of time. Fusing retorted that an express trust could not exist in the absence of a declaration of trust manifested and proved by some writing signed by Fusing as title-holder or by Sia or EON Bank as donors. Fusing further submitted that resulting trusts are out of the purview of s. 9 of the Ordinance, and was therefore caught by the residual period of six years provided by Art. 97 of the Schedule thereto.

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a **Held:**

Per Mahadev Shankar JCA (delivering the judgment of the Court):

- b* [1] A claim to intervene, or for that matter an application to amend a pleading, should be struck out *in limine* on the ground of limitation only in cases where it is manifestly plain that the cause of action upon which the claim is based is barred by limitation.
- c* [2] In the instant case, if, on the assumption that all the facts pleaded are true, it is manifestly obvious that the claim is barred, and limitation is pleaded by way of defence, the matter should not be allowed to go further. On the other hand, if there is material which if established will take the claim out of bounds of the Ordinance, the matter should go to trial.
- d* [3] It has never been enough for a party who wishes this kind of application to be struck out in limine and on affidavit evidence to show merely that he has a “reasonably arguable case” that limitation has expired.
- e* [4] The specific purpose for which a trust is created is a matter for inference. It is not necessary that an express declaration should be proved. That being so, what we have in the instant case is a question of mixed law and fact which merits a full hearing.
- f* [5] The facts pleaded in the affidavits go beyond the opinion of the respondents’ Counsel in the Court below that a “resulting trust” was created, when what is being alleged is that the specific purpose for which the money was provided was that Fusing should hold the shophouse in trust, and not as beneficial owner.

[Appeal dismissed]

[Bahasa Malaysia Translation of Headnotes]

- g* **UNDANG-UNDANG AMANAH:** *Guaman-guaman terhadap amanah yang disebabkan - Ordinan Penghadan Sabah s. 9 - Guaman-guaman dimulakan selepas tempoh selama enam tahun diperuntukkan oleh Perkara 97 Jadual di situ - Samada dihalang oleh masa - Amanah yang diakibatkan - Samada di luar skop s. 9*

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UNDANG-UNDANG AMANAH: *Amanah nyata - Pembentukan - Samada boleh wujud dalam ketiadaan suatu pengisytiharan amanah - Samada merupakan hal-perkara inferens.*

i

Dalam tahun 1984, perayu (Fusing) telah menjadi penerima pindahan berdaftar dan pemilik sah sebuah rumah kedai di Tawau, Sabah (premis tersebut). Kemudiannya, premis tersebut telah dipajakkan kepada EON Finance Berhad (EON Finance). EON Finance kemudiannya mendakwa bahawa pemilik benefisial rumah kedai itu bukannya Fusing tetapi EON Bank Berhad (EON Bank), dan dengan itu enggan membayar sewaan atau mengosongkan premis tersebut. Dalam tindakan yang berikutnya (antara lainnya untuk milikan kosong) yang telah difailkan oleh Fusing terhadap EON Finance, selepas pliding-pliding ditutup, EON Bank dan seorang yang bernama Sia Kie Sung (Sia), setiap satunya menuntut bahawa mereka telah memberikan keseluruhan wang belian untuk premis tersebut, telah memohon dan telah dibenarkan untuk mencelah dalam tindakan itu. Permohonan ini telah dibuat pada bulan Februari 1995. a

Fusing tidak berpuashati dengan perintah itu dan telah sejak itu merayu terhadapnya. Di hadapan Hakim rayuan yang bijaksana, Fusing berhujah bahawa kedua-duanya, EON Bank dan Sia tidak seharusnya dibenarkan mencelah kerana tuntutan mereka telah dihalang oleh s. 9 Ordinan Penghadan Sabah. Sia dan EON Bank menuntut bahawa oleh kerana mereka telah memberikan wang, maka wujud amanah yang diakibatkan atas nama mereka, yang mana menyebabkan bahawa tuntutan mereka tidak boleh dihalang oleh perluputan masa seberapa panjang sekali pun. Fusing menempelak bahawa sesuatu amanah nyata tidak boleh wujud dengan ketiadaan suatu pengisytiharan amanah yang telah ditunjukkan dan dibuktikan oleh tulisan yang telah ditandatangani oleh Fusing sebagai pemegang hakmilik atau oleh Sia atau EON Bank sebagai penderma. Fusing selanjutnya berhujah bahawa amanah-amanah yang diakibatkan adalah di luar skop s. 9 Ordinan, dan dengan itu dirangkum oleh tempoh baki enam tahun yang diperuntukkan oleh Perkara 97 Jadual di situ. b

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

- [1] Suatu tuntutan untuk mencelah, ataupun suatu permohonan untuk meminda pliding, seharusnya dibatalkan *in limine* atas alasan penghadan hanya dalam kes-kes di mana ianya jelas bahawa kausa tindakan di atas yang mana tuntutan itu diasaskan adalah dihalang oleh had masa. d
- [2] Dalam kes semasa, jika, atas tanggapan bahawa kesemua fakta yang telah diplidkan adalah benar, ianya jelas bahawa tuntutan itu telah dihalang oleh masa, dan penghadan diplidkan melalui pembelaan, perkara itu tidak seharusnya dibenarkan untuk berterusan. Sebaliknya pula, sekiranya terdapat bahan-bahan yang mana jika dibuktikan akan membawa tuntutan itu keluar daripada lingkungan Ordinan itu, maka perkara itu seharusnya dibicarakan. e

- a* [3] Ianya tidak pernah memadai bagi sesuatu pihak yang mahukan permohonan seperti ini dibatalkan *in limine* dan berdasarkan keterangan affidavit untuk menunjukkan semata-mata bahawa beliau mempunyai “reasonably arguable case” bahawa had masa telah luput.
- b* [4] Tujuan khusus bagi yang mana sesuatu amanah diwujudkan adalah suatu hal inferens. Ianya tidak perlu bahawa suatu pengisytiharan nyata seharusnya dibuktikan. Dalam keadaan yang sedemikian, apa yang terdapat dalam kes semasa ini adalah campuran antara persoalan undang-undang fakta yang mana mewajarkan suatu perbicaraan penuh.
- c* [5] Fakta-fakta yang diplidkan dalam affidavit-afidavit melampaui pendapat Peguam responden dalam Mahkamah dibawah bahawa suatu “resulting trust” telah diwujudkan, sedangkan apa yang didakwa adalah bahawa tujuan spesifik bagi yang mana wang itu telah diberikan adalah bahawa Fusing seharusnya memegang rumah kedai itu dalam amanah, dan bukannya sebagai pemilik benefisial.
- d*

[Rayuan ditolak]

Case referred to:

Permalu a/l Vyrapan v. G. Papathi d/o Govindasamy [1992] 4 CLJ 2024

e **Legislation referred to:**

Sabah Limitation Ordinance, s. 9, Art. 97 to Schedule

Other sources referred to:

Halsbury's Laws of England, 4th Edn. Reissue, Vol. 48 paras. 543, 599, pp. 273, 315
Rustomji on Limitation, 7th Edn., para. 18, pp. 183, 184

- f* For the appellant - Cecil Abraham (Bharti Seth and Simon Seth with him); M/s Shim Pang & Co.
For the 1st & 2nd respondents - Mekanda Singh Sandhu; M/s. Paul Kan & Co.
For the 3rd respondent - Ian Ghee; M/s. Ting & Co.

g **JUDGMENT**

Mahadev Shankar JCA:

The facts of this case have been fully set out in the judgment of Ian Chin J.

- h* Suffice to say therefore that the appellant (‘Fusing’) was registered as the transferee and legal owner of a shophouse (‘shophouse’) in Tawau on 27 March 1984. Fusing then leased the shophouse to EON Finance Bhd. (‘EON Finance’). Differences arose between them and EON Finance discontinued paying rent and refused to vacate. So Fusing filed the action (which is now the subject matter of this appeal) to have themselves declared owner and for other consequential reliefs. EON Finance asserts that EON Bank Bhd. (‘EON Bank’) is the beneficial owner. After the pleadings were closed and the trial
- i*

was about to begin Sia Kie Sung ('Sia') and EON Bank applied to intervene. Each of them claims ownership of the shophouse. Each of them claims to have provided the entire purchase moneys for the shophouse to Fusing so that Fusing would hold the shophouse in trust for Sia and/or for EON Bank as the case may be. This application was made on 27 February 1995. a

We need only concern ourselves here with the Fusing's submission that Sia and EON Bank should not have been allowed to intervene because their claim is barred by s. 9 of the Sabah Limitation Ordinance ('the Ordinance'). It reads in material particular as follows: b

9. Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose, ... for the purpose of following in his or their hands such property, shall be barred by any length of time.	Suit against express trustees and their representatives	c
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There is no specific documentation which spells out the purpose for which EON Bank channelled the purchase moneys through Sia to the vendor of the property. Fusing did not physically pay the vendor. Their reasons why the funds were channelled to the vendor in this way need not detain us here. In the affidavit filed for Sia and EON Bank it was claimed that because Sia and EON Bank provided the moneys, there was a resulting trust in their favour and their claim cannot be barred by the lapse of any length of time. d

Mr. Cecil Abraham of Counsel for Fusing referred us to the marginal note of the Ordinance in s. 9 and contended that an express trust could not exist in the absence of a declaration of trust manifested and proved by some writing signed by Fusing as title-holder or by Sia or EON Bank as donors. He referred to Vol. 48 of *Halsbury's Laws of England* 4th Edn. (Reissue), para. 543 at p. 273. He also referred to para. 599 at p. 315 and submitted that "resulting trusts" are out of the purview of s. 9 of the Ordinance, and was therefore caught by the residual period of six years provided by Art. 97 of the Schedule thereto. e

In our opinion, a claim to intervene, or for that matter an application to amend a pleading should be struck out *in limine* on the ground of limitation, only in those cases where it is manifestly plain that the cause of action upon which the claim is based is barred by limitation. *Permalu a/l Vyrapan v. G. Papathi d/o Govindasamy* [1992] 4 CLJ 2024 was such a case. If, on the assumption that all the facts pleaded are true, it is manifestly obvious that the claim is barred **and** limitation is pleaded by way of defence, the matter should not be allowed to go further. f

On the other hand, if there is material which if established will take the claim out of bounds of the Ordinance, the matter should go to trial. g

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a This is why it has never been enough for a party who wishes this kind of application to be struck out *in limine* and on affidavit evidence to show merely that he has a “reasonably arguable case” that limitation has expired.

b We are far from convinced that the English authorities cited by Mr. Abraham concludes the matter. The Ordinance is based on the Indian Limitation Act. In *Rustomji on Limitation* (7th Edn.) at p. 183 there appears this passage:

c 17. **Specific purpose, vested in trust.** – “**In trust for any specific purpose**” refers to trusts created for some definite or particular purpose or object as distinguished from trusts of a general nature, such as the law imposes upon executors and others who hold recognised fiduciary positions. “**Specific purpose**” means a purpose which has been specified by the author of the trust. A specific purpose, within the meaning of s. 10, must be a purpose that is either actually and specifically defined in the terms of the will or settlement itself, or a purpose which, from the specified terms, can be certainly affirmed. **The specific purpose is a matter of inference It is not necessary that an express declaration should be proved.**

d In England inferences drawn from the conduct of the parties have been held sufficient to establish an express trust and I think the same principle should apply to trusts of specific purpose within the meaning of s. 10. “**Specific purpose**” in s. 10 is used in contradistinction to trusts arising by implication of law, e.g. resulting or constructive trusts. (Emphasis added).

e We will leave Counsel for the respective parties to delve further into the cases cited therein. If the specific purpose for which a trust is created is a matter for inference it seems to us that we have a question of mixed law and fact here which merits a full hearing. In the subsequent para. 18 there appears this passage at p. 184:

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To apply s. 10 the suit must be or on behalf of the *cestui que trust* to recover for his benefit the trust property. If the suit is in substance for this purpose, it will be saved from the bar of limitation by s. 10, and will not be allowed to fail upon a mere matter of pleading.

g This reflects our sentiments exactly, The facts pleaded in the affidavits go beyond the opinion of the respondents’ Counsel in the Court below that, “a resulting trust” was created, when what is being alleged is that the specific purpose for which the money was provided was that Fusing should hold the shophouse in trust, and not as beneficial owner.

h So we dismissed this appeal with costs.

Reported by W.A. Sharif

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